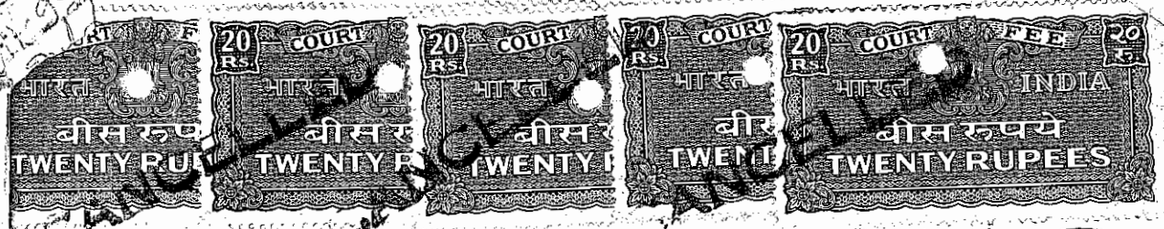

CF 100/-
RS.

1

BEFORE THE HON'BLE HIGH COURT OF MADHYA PRADESH
J A B A L P U R

Writ Petition No. 5064/99

Chhattisgarh Distillery (Now known as
Kedia Castle Delleon Industries Ltd.)
Kedia Nagar, Village Khapri, Post
Kumhari, District Durg (M.P.)
Through its constituted attorney
P.C.Chourey, Resident of 16/2,
South Tukoganj, Indore.... ... .PETITIONER

v/s

1) General Secretary,
Chhattisgarh Chemical Mill Majdoor
Sangh, Rajnandgaon (M.P.);

2) Industrial Court (Bench)
'Krishna Sadan', 16-H.I.G.,
Shankar Nagar, Raipur (M.P);

3) State of Madhya Pradesh,
Through Secretary,
Department of Labour,
Vallabh Bhawan, Bhopal (M.P.)... ... RESPONDENTS

WRIT PETITION UNDER ARTICLES 226/
227 OF THE CONSTITUTION OF INDIA

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

W.P. No.5064 of 1999

Chhattisgarh Distillery

Vs.

General Secretary , Chhattisgarh Chemical Mill Majdoor Sangh and others

JUDGMENT

For consideration

Sd/-
Sunil Kumar Sinha
Judge

Hon'ble the Chief Justice

I agree

Sd/-
Chief Justice

Post for 7/07.2005

Sd/-
Sunil Kumar Sinha
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

(DIVISION BENCH)

Coram : **Hon'ble Mr. A.K. Patnaik, C.J.,**
Hon'ble Mr. Sunil Kumar Sinha, J

W.P. No.5064 of 1999

Chhattisgarh Distillery

Vs.

General Secretary , Chhattisgarh Chemical Mill Majdoor Sangh and others

---

Appearance:

Mr. A.M.Mathur, Senior Advocate, Mr. R.K.Gupta, and Mr.Rohit Arya, Srenior Advocates with Shri Abhishek Sinha, Advocate for the petitioner.

Mr.Sujoy Paul, Advocate with Mrs. Bharadwaj, for respondent no.1.

Mr.V.V.S.Murthy, Deputy Advocate General for respondent no.3/State of Chhattisgarh.

JUDGMENT

(Delivered on 7 July 2005)

Sunil Kumar Sinha, J,

This writ petition has been filed for quashing the award dated 16.10.1999 passed by the State Industrial Court, M.P., Bench Raipur under section 51 of the M.P. Industrial Relations Act 1960 (Act 27 of 1960) in Reference Case No.10/MPIR Act/1996.

(2) Brief facts of the case are that the petitioner is a Public Limited Company, registered under Indian Companies Act 1956, having a factory in village Khapri, P.O. Kumhari, District Durg (C.G). The said Company manufactures potable alcohol and supplies to the State Government under the Excise Act. On being satisfied about existence of an industrial dispute regarding services of the employees represented through the respondent union, in between the petitioner and the said employees, the State Government made a reference u/s 51 of M.P. Industrial Relations Act 1960 (hereinafter referred to as "the Act") to the Industrial Court, Raipur on 26.02.1993 for its adjudication/ arbitration. The terms of the reference are as under:

(अ) क्या वेतन एंव भत्तों के पुनरीक्षण का औचित्य है ? यदि हॉ तो वेतन, भत्ता एंव अन्य भत्तों की क्या योजना होना चाहिए एंव इस संबंध में नियोजक को क्या निर्देश दिये जाना चाहिए ?

(ब) क्या प्रतिवर्ष 15 दिन का आकस्मिक अवकाश, 10 दिन का त्योहारी अवकाश तथा 30 दिन का चिकित्सा अवकाश दिये जाने का औचित्य है ? यदि हॉ तो इस संबंध में नियोजक को क्या निर्देश दिये जाना चाहिए ?

(स) क्या संलग्न परिशिष्ट में उल्लेखित एम्पलाईज का सेवा पृथकीकरण वैध एंव उचित है ? यदि नहीं तो इस संबंध में नियोजक को क्या निर्देश दिये जाना चाहिए ?

(3) After service of the notice to the parties, a preliminary objection was filed by the petitioner on 27.4.1993. It was mainly contended vide the said preliminary objection that the provisions of sub-section (2) of Section 51 of the Act have not been complied with when the reference was made. It was also contended that the party no.1 i.e. respondent no.1 herein had never raised a dispute and has not given a notice of change under section 31 of the Act to the petitioner in Form "J". Further the requirement of section 39(1) of the Act has not been complied with and as such since the matter was never seized in conciliation, no report was sent to the Chief Conciliator u/s 43(2) of the Act. The willingness of the parties was never obtained as is required u/s 43(6) of the Act and the conciliation proceedings have not been resorted to, therefore, the mandatory provisions have not been complied. This was also taken as an objection that the dispute in respect of suspension of the persons included in the attached list with reference is not such a dispute which is not likely to be settled by other means. Taking these objections, it was prayed that since the objections go to the root of the matter and relate to the jurisdiction of the Industrial Court, it should be decided first taking them as the preliminary issues in the matter.

(4) After receiving the said objection the matter was referred by the Industrial Court Judge, Raipur to the President, Industrial Court, Indore on 20.10.1994 for constituting a larger Bench to decide the same. On 31.5.1995 the Division Bench of the Industrial Court, Indore, after hearing the parties, decided the

questions raised in the preliminary objection by the petitioner and the same was dismissed.

(5) The State Government on 24.5.1995 further added the list of 807 employees in the original list of employees annexed as schedule to term No.3 of the reference. This was made a part of records of tribunal on 07.08.1995. Thereafter, the State Government further added term no.4 to the reference made to the Industrial Court vide its order dated 31.7.1995 which relates to the interim relief after which the respondent Union filed its statement of claim before the Industrial Court on 11.9.1995.

(6) Since the preliminary objection about the maintainability of the reference was dismissed, a writ petition bearing W.P.No.1231/1995 was filed by the petitioner, before the single Judge of the Indore Bench of the High Court of Madhya Pradesh but this petition was also dismissed vide order dated 27.09.1996. Against the said dismissal, the petitioner preferred a Letters Patent Appeal No.156/1996 before the Division Bench. Ultimately, this matter went in the full Bench and by order dated 06.4.1999 the full Bench disposed of the said L.P.As. and directed the Industrial Court, Raipur to decide the reference on merits within a period of 4 months as per law after hearing the parties. The parties were directed to appear before the Industrial Court on 10th of May 1999. In fact, the LPAs were disposed of by the Full Bench by a consent order by which the Industrial Court's order dated 31.5.1995 rejecting the preliminary objection and

upholding the maintainability of the reference and the writ court order dated 27.9.1996, affirming the said order of the industrial Court were upheld and the reference made by the State Government to the Industrial Court was found in order. It was also observed that any observations made by the successive bench of the High Court touching the substance and the merit of the dispute between the parties shall have no bearing in disposal of the reference by the Industrial Court which shall proceed in the matter uninfluenced by any such order.

(7) After the said order the matter was again taken up by the Industrial Court. It appears that the petitioner, even after giving repeated opportunities by the Industrial Court, did not file its written statement or the Statement of claims and ultimately the parties were called upon to lead their evidence. Respondent no. 1 examined only one witness and closed its case. Though the witness of respondent no. 1 was cross examined by the counsel for the petitioner but the petitioner did not produce any oral or documentary evidence in the case. The Industrial Court, after hearing the arguments passed the impugned award dated 16.10.1999 by which a direction was issued to the petitioner to reinstate the workers enlisted in the order of reference with 66% back wages. It was also directed that the minimum wages, dearness allowance and other allowances fixed by the State Government shall be payable to the employees from the date of their reinstatement. It is against this order the petitioner has filed this writ petition.

(8) Shri A.M. Mathur, learned senior counsel appearing for the petitioner submits that term no.3 of the reference was wrongly amended by the State Government after a very long period by adding a list of persons to the Schedule annexed to the reference. It is submitted that such an amendment was contrary to Section 52-A of the Act 1960. It is further submitted that this is an error of law apparent on the face of record as the State Government was having no authority to amend the reference and in consequence the Industrial Court was having no jurisdiction to adjudicate upon the matter which was added later on by the amendment made by the State Government on a subsequent date.

He further submits that term no.3 of the reference relates to the termination of the workers whereas the list of the persons annexed to the reference shows that the workers are suspended persons. In this manner learned counsel submits that the Industrial Court erred in law in considering the case of suspended persons whereas term no.3 of the reference relates to the terminated persons only.

The third argument is that the industrial Court failed to appreciate that the respondent Union is only a registered union and not a recognized union, therefore, it cannot maintain such claim. He further argues that neither in the statement of claim nor in the evidence it has been stated that the enlisted persons were members of the respondent Union, therefore, the Union

could not represent the enlisted persons in this reference before the Industrial Court.

He also argues that the claim set-forth by the respondent Union by way of statement of claims has not been established by examining the witnesses in this regard, hence respondent no.1 failed to establish the factum of employment, identity of persons, date and factum of their termination etc., etc., and the learned Judge of the Industrial Court committed an error of law by granting relief in favour of the respondent Union.

In nut-shell, learned counsel for the petitioner has assailed the finding of the facts arrived at by the industrial Court on the ground of lack of the evidence led by union/respondent No.1 and the same being based on sympathetic considerations only.

Lastly it has also been submitted that the answer to terms No.1 & 2 of the reference is also incorrect and is based on no evidence on record. It is a settled principle of law that without recording the finding in relation to economic capacity of the employer, no such orders could be passed.

(9) Per contra, learned counsel for the respondent No.1/Union submits that so far as the technical objections in relation to the maintainability of the reference are concerned, they cannot be reagitated at this stage as this matter stands finally concluded by the order dated 27.11.2000 passed in the aforesaid L.P.As by the full Bench of the M.P.High Court which was in fact a consent order and it was consented to by the petitioner and held by the said Court that the matter has to be decided on merits holding

the reference to be proper and in order and in accordance with law.

He also submits that strict principles of Evidence Act are not applicable in the proceedings before the Industrial Tribunal and the tribunal has rightly come to the conclusion regarding illegal termination of the employees and has also rightly held that the employees should be reinstated with 66% back wages.

(10) We have heard learned counsel for the parties at length and have also perused the records of the Industrial Court.

(11) The first point raised by learned counsel for the petitioner relates to submission of the additional list by the State Government for adding the names of employees in the schedule annexed to term No. 3 of the reference. As already stated above, learned counsel for the petitioner submits that there is no provision of amendment of the reference under the Act1960 and if any amendment is to be done that can only be done within the scope of Section 52-A of the said Act. He takes us to the provisions of Section 52-A. This section deals with the powers of the State Government to include other undertakings in the reference. It postulates that where an industrial dispute concerning any undertaking in an industry or branch thereof has been or is to be referred under Section 51 or Section 52 and the State Government is of the opinion that the dispute is of such nature that any undertaking group or class of undertakings of similar nature is likely to be interested in or affected by such

dispute, the State Government may at the time of making such reference or at any time thereafter include in that reference such undertakings, group or class of undertakings whether or not at the time of such inclusion any dispute exists or is apprehended in that undertakings, group or class of undertaking.

Learned counsel submits that it is the only provision which empowers the State Government to amend the reference and no other powers of amendment have been vested in it. Therefore, the action taken by Government by adding more number of workers in the schedule is without jurisdiction. Neither the Government was having any authority to do the same nor theIndustrial Court was having any jurisdiction to adjudicate upon the matters of persons whose names were later on added in the schedule annexed to term No. 3 of the reference.

On other hand, learned counsel for the respondent/Union submits that in fact it is not an incident of amendment of the term of reference at all. The Government has not amended the term of reference and has only corrected the schedule of the reference by adding the names of some more persons. It is for this reason, no objection was taken by the petitioners at any stage of hearing of this matter either before the Tribunal or before the single bench or full bench of the High Court. Since the petitioner has lost before the Tribunal they are taking an opportunity to agitate this point saying it to be an amendment in the terms of the reference.

(12) We have seen the records of the Tribunal and have found that the above addition made by State Government was through a letter dated 24.5.1995 which was made as part of the records of the Tribunal on 27.8.1995. After perusal of the records, it appears that it was not opposed by the petitioner either by filing an objection before the Tribunal or by taking additional grounds before the writ Court and the appellate Court. A complete perusal of the impugned order also shows that even this ground was not taken at the time of final hearing of the case and ultimately, the impugned award was passed without making any comment on the said point raised by the petitioner for the first time before this Court by way of this writ petition.

(13) Since this ground is taken for the first time in the writ petition, the validity of the impugned order passed by the tribunal cannot be tested in reference to this ground directly raised before this Court. It is a settled principle of law that under Article 226 of the Constitution, the High Court does not sit or act as an appellate authority over the actions of the sub-ordinate authority or tribunals. It has to confine itself to correcting any error of jurisdiction by the authorities and it cannot assume the *suo motu* jurisdiction of the appellate Court and attempt to correct every mistake assumed to have been made by the tribunal. Even the absence of provision of appeal against the order of tribunal does not enlarge the powers of interference under Article 226 and the High Court could not exercise the power of appellate authority. Reference may be made to a decision of the Supreme Court

reported in ***(1998) 8 Supreme Court Cases 237 (Appropriate Authority and another -Vs- Sudha Patil (Smt) and another)***. Even otherwise also if we examine the matter, we find that there is no amendment in the terms of the reference. What is corrected is the list alone and the term no.3 has been left as it is. In fact, the matter under reference vide term no.3 was to test the validity of the "mass termination" allegedly effected by the petitioners in this matter, in which the correction of the list annexed with the said term has got no bearing.

We are not in agreement with the arguments advanced by learned counsel for the petitioner and we accordingly reject it.

(14) The second argument advanced by learned counsel for the petitioner relates to the fact that the persons enlisted with term no.3 of the reference are shown to be suspended persons whereas the reference relates to the adjudication of terminated persons, therefore, the reference itself is illegal and lacks in mandatory mentions.

This argument advanced by learned counsel cannot be sustained at this stage. If we examine the preliminary objection filed by the petitioner before the Industrial Court then it would be clear that this objection was taken vide ground No.(i) in the said objections and the division bench of the Industrial Court over ruled the same by its order dated 31.3.1995. Against this order, a writ petition was filed before the single bench and the Single bench also dismissed this writ petition against which the Letters Patent Appeals were filed which were finally disposed of by a

common order dated 06.04.1999 passed by the Full Bench of the M.P.High Court and the orders passed in relation to this objection and other objections also were confirmed and upheld. The relevant portion of the order reads as under:

> *2. After arguing for a while LC for parties agreed for disposal of these appeals by the following consent order:*
>
> *1. The Industrial Court order dated 31.5.1995 upholding the maintainability of reference and the writ Court order dated 27.09.1996 affirming that order is upheld. In other words the reference made by the Government to the Industrial Court is found in order and would not be subject to any further objection by the appellants.*

In these facts and circumstances , it can safely be held that this point raised by the petitioner at the earliest stage has been decided by the Full Bench of the M.P. High Court vide the order referred to above, which was a consent order, and the same stands concluded. The petitioner cannot reagitate these points before this Court. More over, the chart annexed to term no.3 of the reference goes to show the status of employees on a particular date. This mention in a column in the chart cannot be treated as an evidence of the present status of the petitioners or their status on the date of satisfaction of the State Government to make the reference.

(15) So far as the third submission in relation the authority to represent the employees by the present union/respondent no.1 is concerned, this point was not raised by the petitioner by filing any reply as we have already mentioned above, the petitioner has not filed any reply or written statement or its own statement of

claims before the industrial Court. This has only been argued by learned counsel for the petitioner, to which the tribunal said that this point stands finally concluded by the order passed by the full Bench as the full bench held all the technical objections to be overruled by passing a consent order to pass an award on merits. Before us it is submitted that since the present union is a registered union and is not a representative union and it has not been brought on record that the employees are the members of this registered union, therefore, this union was not competent to represent their case. We have considered this argument advanced by learned counsel for the petitioner. Section 51 of the Act provides for reference of dispute to the Labour Court, Industrial Court or the Board and the Agency defined in the section is the Government. It has been provided that if on a report made by the Labour Officer or otherwise the Government is satisfied that an industrial dispute exists and there also exists any of the situation described in clause (a) to (c) read with the two clauses of proviso, the Government is invested with the discretion to refer the dispute to the said Courts or the Board. Section 52 of the Act provides for a reference by the Unions and it has been provided that "representative Union" can refer an industrial dispute for adjudication, if the matter relates to Schedule-I either to the Board or the Industrial Court and if the matter relates to the matters other than Schedule-I, to the Labour Court. This right of the "representative Union" is subject to the conditions mentioned in 3 clauses of the proviso to sub-section (1). The word "representative union" has been defined in section 2(28) of

the Act which means an Union for the time being recognized as a "representative union" under this Act.

The word "registered union" has not been defined in section 2 but simple word 'union' has been defined vide section 2(34) which means a Trade Union of Employees which is registered under the Indian Trade Unions Act 1926. Therefore, so far as the reference of a dispute to the respective Court or the Board is concerned, they are governed by the provisions of section 51 and 52 of the Act. The basic difference between these two sections is that under section 51, the reference shall be made by the Government. However, under section 52, the right of reference has been conferred on 'representative union'. Certainly, the case in hand is not governed by section 52 of the Act and the same is governed by section 51 because the reference was not made by the respondent/Union, but was made by the State Government at the instance of the respondent-Union.

The argument advanced is that this Union cannot represent the workers as it has not been stated anywhere that the workers were the members of this union. In the opinion of this Court, the same is a question of fact which would have been gone into by the Industrial Court if such an objection would have been raised before it by the petitioners by filing a written statement or by any other means. Since no material is placed before us by the petitioners to show that the employees were not the members of the respondent Union, therefore, we are unable to express any opinion in this regard. The argument advanced by learned counsel for the petitioner is not supported with any material on

record, therefore, we cannot accept this argument as a ground to set aside the award passed by the tribunal.

(16) Now coming to the next argument that in fact the respondent Union could not prove its claim set forth before the Industrial Court, first of all, we shall refer to the Statement of the claim made by the Union. The statement of claim filed by the respondent Union especially pertaining to reference no.3, states that all the workers enlisted in the schedule were employees of the petitioner. The standard standing orders are applicable to their establishment. It has been stated that these workers were not issued any charge sheet nor any enquiry was conducted and they were terminated from their jobs. Even the order of termination was not communicated to them and the workers were not paid any retrenchment compensation. It is also stated that the workers junior to the workers mentioned in the reference were retained and the new workers have also been appointed. It is also stated that the workers are always willing to work from which they have been deprived of illegally. Pleading all these facts vide Para 8 to 20 of the statement of claims, the respondent Union has prayed that the concerned workers may be reinstated in service alongwith all the benefits/wages/compensation.

As we have already stated above, no written statement to the aforesaid claim set forth by the respondents has been filed by the petitioner in this case. Even the petitioners have also not filed their own statement of claim before the industrial Court. Not only this, the unfortunate position is that no documentary or oral

evidence was produced by the petitioners before the tribunal and ultimately only one witness namely Bajiram was examined by the respondents on 25.4.1996. It is on the basis of statement this witness only, the entire award has been founded by the industrial Court.

Now we have to examine the legality of the award passed by the Industrial Tribunal in the above factual back ground. It has been held in the matter of ***Appropriate Authority and another -Vs- Sudha Patil (Smt.) and another (supra)*** that the parameters for exercise of supervisory jurisdiction of the High Court under Article 226 of the constitution while examining the decision of an inferior tribunal is limited. The Power being supervisory in nature, in exercise of such power, a finding/conclusion of an inferior tribunal can be interfered with if the High Court finds that in arriving at the conclusion, the Tribunal has failed to consider some relevant materials or has considered some extraneous and irrelevant materials or that the finding is based on no evidence or the finding is such that no reasonable man could come to such a conclusion on the basis of which the finding has been arrived at.

Learned counsel for the petitioner submits that since the industrial dispute was referred at the instance of the respondent No.1/Union, therefore, it was incumbent upon the respondent union to establish its claim on the basis of principles of pleading and proof before the tribunal which they could not establish.

Referring to the decision rendered in the matter ***of Rajasthan State Ganganagar S. Mills Ltd., -Vs- State of***

Rajasthan and Another (2004) 8 SCC 161 learned counsel for the petitioner submits that the burden of proving the claims as set forth by the respondent Union was on them and the respondent Union could not produce any evidence in relation to the factum of termination and illegality thereof. The witness examined on behalf of the respondent has also not established all these facts. No receipt of salary/wages etc., etc., have been proved on record. He submits that mere non-production of muster roll or the list of the workers of the Company would not entitle to the industrial Court to hold that the workmen referred to in the list were the employees of the petitioner and were illegally terminated.

He further referred to decision of the apex Court rendered in the matter of ***Municipal Corporation, Faridabad -Vs- Sriniwas 2004 (8) SCC Pg. 195*** and submitted that in the matter of an industrial dispute, the apex Court held in the said case that the burden of proof was on the workmen to show that he had worked continuously for 240 days in the preceding one year prior to his alleged retrenchment. On the facts of that case, since the workmen adduced no evidence whatsoever before the tribunal or the High Court, apart from examining himself, it was held that the High Court committed a manifest error in reinstating the workmen only on the basis of adverse inference drawn against the employer for not producing muster rolls. He further argues that on the basis of this case law no adverse inference can be drawn against the employer for non-production of the evidence because a party in order to get the benefit of section 114 III.(g) of the

Evidence Act must place some evidence in support of his case which is lacking here, therefore, in the present case also no such benefit can be extended to them. He further submits that the burden is always on a party to prove his own case. Even in an ex-parte matter, like a civil one, the plaintiff is required to prove his own case on the basis of his own evidence and if the plaintiff fails to prove his case, the Court will never accept his case only on the ground that the defendant remained absent and has not resisted the claim of the plaintiff. He submits that even if the entire evidence produced by the respondents is taken into consideration the findings arrived at by the industrial Court cannot be recorded. The evidence is vague and general which does not establish the rights of the employees of the annexed list to term no.3 of the reference.

(17) On the other hand learned counsel for the respondents, referring to the decision rendered in the matter of ***Workmen represented by the Ananda Bazar Group of Publication Employees Union -Vs- Ananda Bazar Patrika Limited and others, 1999 II CLR 79*** argues that the provisions of the Evidence Act are not applicable in proceedings before Industrial Tribunal. To insist that facts must be "legally proved" or proved "beyond doubt" is a wrong approach. He submits that there should be only "material" and not evidence as required by Evidence Act. He also argues that a question was raised before the Industrial Court that the employees mentioned in the Annexure to term No.3 are the employees of the petitioner and

they have wrongly been terminated by them, therefore, if the petitioner was taking this plea to be false the petitioner should have produced the documents like service records of the workmen and should have shown that whether they are the workmen engaged with the petitioner or not? Whether they are terminated or suspended employees? Whether they are entitled to any such relief or not? Since the petitioner could not produce any document in relation to all these facts, therefore, the best evidence was suppressed by the petitioner which they have withhold and in this situation an adverse inference was to be drawn against the petitioner which the learned industrial Court has drawn in this case. He relies on a decision of the Supreme Court rendered in the matter of ***Gopal Krishnaj Ketkar –Vs- Mohamed Haji Latif and others, AIR 1968 S.C. 1413***. He also relies on a decision of the Supreme Court reported in ***1996(9) SCC 439 (Food Corporation of India Workers' Union –Vs- Food Corporation of India and another)***. Further relying on the decision rendered in the matter of ***U.P. State Electricity Board –Vs- Rajesh Kumar, (2003) 12 SCC 548*** learned counsel for the respondent submits that the correctness of the list furnished by them has not been challenged before the Industrial Court by the Management by producing any contra-evidence or the original records which it possessed, therefore, that should be held to be correct on the ratio of decision referred to above and the order should be held to be proper in this regard.

In the matter of ***R.V.E. Venkatachala Gounder –vs Arulmigu Viswesaraswami & V.P. Temple and another***

reported in (2003) 8 SCC 752 it has been held vide Para 29 of the judgment that in a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in ***A.Raghavamma and another –Vs- A. Chenchamma and another AIR 1964 S.C. 136*** there is an essential distinction between the "burden of proof" and "onus of proof". The burden of proof lies upon a person who has to prove a fact and which never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. The apex Court has held that in a suit for possession based on title, once the plaintiff has been able to create a "high decree of probability" so as to shift the onus on the defendant it is for the defendant to discharge his onus and in absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title. The above proposition of law has been laid down by the apex Court when there is a by-parte contest. The Division of Madhya Pradesh High Court has held in the matter of ***Nagar Palika Nigam, Gwalior –Vs- Motilal Munnalal, reported in 1977 MPLJ 562*** that even in a matter where an *ex parte* case is to be taken, the courts must take good care to see that the plaintiff's case is at least *prima facie* proved. Mere absence of the defendant does not justify the presumption that the whole of the plaintiff's case is true. Even the plaintiff failed to make out a prima facie case, the defendant is entitled to

ex debito justitiae to have such a decree set aside. It has further been held that even if no issues are framed it does not absolve the plaintiff of his responsibility to prove his case. The plaintiff is bound to prove his case to the satisfaction of the Court and his burden is not lightened merely because the defendant is absent.

In the light of the pronouncements of the apex Court and also the principles laid down therein if we examine the present case, it appears that after filing a claim on many points as referred to above, the respondent Union has examined only one witness. The said witness has given a vague statement which does not pertain to the factum of employment, factum of termination and non following of proper procedure of termination as are envisaged under the law. The statement does not go to show as to how many persons were terminated on which date and who are those persons. As has been held by the Calcutta High Court, the provisions of Evidence Act are not applicable in proceeding before the Industrial Tribunal and it is not proper to insist that the facts must be "legally proved" or proved "beyond doubt" but at the same time the principle remains, as has been held by the same judgment, that there should be only "material" though not the evidence as required by the Evidence Act. Even if we examine the matter on this line then after going through the statement of the solitary witness examined by the respondent, we may safely say that even the thing which is said to have been "material" for taking a decision in the case is lacking in this matter and it can be said that even after applying the ratio of this case law, the claim of the union cannot be held to be proved and

allowed. Therefore, we hold that respondent no.1 could not establish as the persons enlisted in the schedule are the workers of the petitioner and they have been illegally terminated by the management. Even a prima facie proof in regard to the relationship of employer and employee has not been established and the order of reinstatement seems to have been passed on the basis of vague and insufficient material on record. So far as the question of drawing adverse inference against the petitioner u/s 114 III.(g) of the Evidence Act is concerned, as has been held in the matter of ***Municipal Corporation, Faridabad (supra)*** in order to get that benefit of section 114 the respondent Union must place some evidence in support of their case. In the present case, the respondent had failed to lead even that some evidence in support of its contention which may attract the provisions of section 114 III.(g) of the Act and the arguments set forth by the counsel for the respondent cannot be upheld and the claim of the respondent cannot be held to be proved by applying these principles.

Learned counsel for the respondent places much reliance on the decision in the case of ***Gopal Krishnaj Ketkar -vs- Mohd. Haji Latif (Supra)*** which postulates that even if the burden of proof does not lie on a party, the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. The apex Court has held that it is not a sound practice for those desiring to rely upon certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon issues

in controversy and to rely upon the abstract doctrine of onus of proof. Placing reliance on this law, he argues that the adverse inference must be drawn which the industrial Court has rightly drawn against the petitioner because it was the petitioner company which was having the attendance register and other documents in their possession which could have been easily produced for throwing light on the controversial issues like relationship of employer and employee, factum of termination and so on and so forth. The principle enunciated by the Supreme Court in this matter can never be applied to this case. The law laid down by the apex Court is distinguishable on this point that in the said case the appellant did not produce the account of Dargah Income. In the course of evidence, he admitted that he was enjoying the income of Plot No.134 but he did not produce any accounts to substantiate his contention. Not only this, there was also an important admission that the appellant had got record of the Dargah income and that account was kept separately, but the appellant has not produced either his own accounts or the accounts of Dargah to show as to how the income from Plot No.134 was dealt with. It is in this circumstance, the apex Court has laid down the above law for application of which the condition precedent is that the so called best evidence must have been in the possession of the party concerned. The Judgment is distinguishable on this point. In the present case there are no circumstances which may lead to conclusion that some records in relation to the services of the employees of Union/respondent no.1 was positively in possession of the

petitioner. Here the petitioner has not admitted anywhere that the members of the respondent union are their employees. It is unfortunate that even the written statement or the statement of claims etc., were not filed by the petitioner and ultimately the respondent Union also could not even prima facie place such material on record on the basis of which the award made by the industrial tribunal can be sustained by this Court.

(18) In light of the above discussion and on the basis of the law referred to above, we are of the opinion that the tribunal has failed to consider these aspects of the matter and the finding of the tribunal regarding the facts referred to above are found to be not fully supported by evidence on record. We set aside the award and hold that the tribunal has wrongly passed the award regarding reinstatement and back-wages of the persons enlisted in the list attached to term no.3 of the reference.

(19) Lastly, learned counsel for the petitioner further submits that answer to terms no.1 & 2 of the reference is also incorrect. He submits that without considering the economic capacity of the employer, the aforesaid award in relation to these terms has been passed. He refers to a decision referred in the matter of ***Officers and Supervisors of I.D.P.L. –Vs- Chairman and M.D., I.D.P.L. and others reported in AIR 2003 S.C. 2870***. He also refers to a document Annexure P-1 which is an order of B.I.F.R. in reference case No.162/98. Learned counsel submits that by this order dated 07.8.1998, the Company has been declared a Sick

Industrial Unit in terms of section 3(1)(o) of the Act and the Industrial Court should not have passed such an award on these terms. It is not clear to this Court as to whether this document was brought to the notice of the industrial Court or not. We cannot entertain such a plea raised for the first time in the writ court that too in the second round of litigation. However, since we have set aside the award, so far as it relates to reinstatement and back-wages, therefore, consequent to the setting aside of relief of reinstatement and the back wages, award on these terms are also set aside.

(20) In the result we hereby set aside the entire award dated 16.10.1999. We are of the opinion that in the facts and circumstances of the case, this matter needs a lawful adjudication by the industrial court. We accordingly direct that this matter is remanded to the Industrial Court for adjudication in accordance with law on merits. The parties must ensure that due cooperation shall be extended by them. We direct that the industrial Court shall given proper opportunity to both the parties to file their claims/written statement, if so desired by them and thereafter it shall again give opportunity to the parties to lead evidence in support of their contentions and after complete hearing, fresh award shall be made. We also direct that the industrial Court shall try to dispose of this case as early as possible preferably within a period of 4 months from the date of receipt of records by the said Court. The Registry is directed to remit the records forthwith which are tagged with

W.P.No.75/2000 alongwith a copy of judgment. To avoid further complications in relation to service of notice etc., we hereby direct that the parties shall cause their appearance before the Industrial Court on 25 July 2005.

There shall be no order as to costs.

Agreed

Sd/-
Chief Justice

Sd/-
Sunil Kumar Sinha
Judge